United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING EN BANC

75-4049

IN THE
UNITED STATES COURT OF APPEALS FOR THE
SECOND CIRCUIT

Nos. 75-4049 and 75-4055

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, and
CAPTAIN EUGENE L. COCHRAN,

Petitioners,

v.

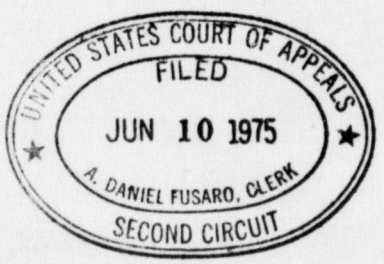
CIVIL AERONAUTICS BOARD,

Respondent.

On Consolidated Petitions to Review an Order of the
Civil Aeronautics Board

PETITION OF THE AIR LINE PILOTS ASSOCIATION, INTERNATIONAL
FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

Pursuant to Rules 35 and 40 of the Federal Rules of Appellate Procedure, the Air Line Pilots Association, International, petitioner in the above-captioned consolidated proceedings, respectfully petitions the Court to grant rehearing and suggests rehearing en banc of the May 27, 1975 decision of a panel of the Court consisting of Circuit Judges Lumbard, Hays and Mulligan.



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In upholding an order of the Civil Aeronautics Board which rejected a number of airlines' embargoes against the transportation of a variety of explosive, flammable, corrosive, poisonous, etiologic, radioactive and other hazardous cargo, the Court has erred in analyzing an exceptionally important issue of law. En banc reconsideration is necessary to avert the potentially catastrophic practical consequences of this legal error. In addition, consideration by the full Court is also necessary to resolve a significant inconsistency between the decision in the instant case and that in Williams v. Trans World Airlines, 509 F.2 942 (2nd Cir. 1975), sustaining an airline's refusal to provide transportation for safety reasons.

1. Overruling ALPA's argument that the provisions of 49 U.S.C. Sec. 1374(a) and 1511(a) [1/] confirm the authority of an air carrier and its personnel to exceed the minimum safety standards set by the government for shipping hazardous cargo and to refuse to transport freight which they believe may prove inimical to safety of flight, the Court stated (sl. op. 3769-71):

> "[W]e cannot characterize the embargoes proposed here as consistuting ad hoc determinations by carriers or carrier personnel that a particular cargo constitutes any special menace or potential for harm. The embargoes. . . in effect barred all materials marked and labelled as hazardous in accordance with existing regulations. The Williams

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1/ Section 1374(a) restates ". . . the duty of every air carrier. . . to provide safe and adequate service . . .;" Section 1511(a) provides, in relevant part, "Subject to reasonable rules and regulations prescribed by the Administrator, any such carrier may also refuse transportation of a passenger or property when, in the opinion of the carrier, such transportation would or might be inimical to safety of flight."

> case . . . cannot, in our view, be supportive of the proposition that the broad interdiction of cargo embraced in the embargoes is in conformity with section 1511(a).
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> "The very language of that section belies the ALPA position. The statute which authorizes the refusal of the carrier to transport property which would or might be inimical to safety of flight is prefaced by the clause "Subject to reasonable rules and regulations prescribed by the Administration. . . ." There are rules which apply to the carriage of hazardous materials, and it is implicit in these rules that such goods, marked, labelled, packaged and stowed in accordance with such rules, are not inimical to flight safety in the judgment of the agencies charged by the Congress with the responsibility of making these determinations. . . . Individual carrier or pilot decision could only lead to administrative chaos unless, under the factual pattern exemplified by Williams, there is an ad hoc determination that some particular freight for some specific reason presents a peril to safe flight. 12/"
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> "12/ ALPA argues that the effect of section 1511(a) is merely to deny carriers the right to accept for transportation hazardous materials which fail to comply with FAA safety rules. In our view, this is a misinterpretation of the section. There is no right to accept non-conforming hazardous materials and thus no need to restrict the right."

2. The Court's analytical error in holding that flight crew members and the traveling public must share their aircraft with hazardous freight is significant; for, the law imposes no duty on airlines to carry dangerous cargo, however packaged. A valid Section 1511(a) determination is not a prerequisite to refusing to transport hazardous cargo, as the Court apparently assumed, since neither that provision, nor any other, requires airlines to carry dangerous articles, even when they are properly packaged, labelled, and the like.

The Court's reasoning is based on the language of Section 1511(a), and we shall assume for the sake of argument that the effect of Section 1511(a)'s phrase, "Subject to the reasonable rules and regulations prescribed by the Administrator," is, as the Court found, to empower the FAA to limit or restrict the right of air carriers to refuse to transport passengers and cargo. However, it is still necessary to look to the FAA regulations themselves to see whether that authority has been exercised and, if so, whether it has been exercised reasonably.

Here, the FAA's rules define certain articles as inherently dangerous; they prescribe a variety of packaging, labelling and other safety measures for shipping these commodities; and they then go on to specify, "No person may carry any dangerous article in a passenger-carrying [or cargo-only] aircraft," except as in accordance with the prescribed safeguards (14 C.F.R. Sections 103.7 and 103.9). These may be reasonable rules and regulations, but they do not subject the right of air carriers to <u>refuse</u> to transport hazardous freight to any substantive or procedural preconditions. On the contrary, the Administrator's rules and regulations merely make it unlawful to <u>accept</u> dangerous articles which do not meet the government's standards for packaging, labelling, etc. They do not even purport to restrict the right of air carriers and their employees to reject hazardous cargo.

Consequently, Section 1511(a) and DOT/FAA regulations on the transportation of hazardous materials leave air carriers at liberty, as common carriers historically have been under the common law, to hold themselves out as common carriers of passengers

and most types of freight, but not as common carriers of other articles, including those classified as hazardous by the ..eral government. State v. Rosenstein, 252 N.W. 251, 254, 217 Iowa 985, 989-90 (1934); Alabama Great Southern R. Co. v. Herring, 174 So. 502, 234 Ala. 238, 240 (1937). This option of a common carrier to refuse to transport hazardous or other undesirable classes of cargo arises as a logical corollary, moreover, to its "responsibility to protect its passengers from danger and inconvenience." Williams v. Trans World Airlines, 369 F. Supp. 797, 805 (S.D.N.Y. 1974), aff'd, 509 F.2d 942 (2nd Cir. 1975). Accord, California Powder Works v. Atlantic etc. R. Co., 45 P. 691, 692-93, 113 Cal. 329 (1896) (it is "optional" whether a common carrier wishes to receive such "dangerous articles as nitroglycerin, dynamite, gunpowder, aquafortis, oil of vitriol. . ."). involves construing CAB

Significantly, the CAB's own regulations expressly recognize that air carriers may decline unwanted categories of hazardous freight. The Board's rules provide that airline tariffs for explosives and other dangerous articles ". . . may contain restrictions on the extent to which participating carriers will accept for transportation such explosives and other dangerous or restricted articles" (14 C.F.R. Sec. 221.104), so long as the tariffs show ". . . the articles which are not acceptable for transportation as well as those articles which are acceptable for transportation only when specified packing, marking and labelling requirements have been met" (14 C.F.R. Sec. 221.38(a)(5)).

Yet, without citing a single statute, regulation or administrative or judicial decision in support of its position, the Board "rejected" airline tariffs and embargoes more restrictive than the effective or proposed DOT/FAA hazardous materials regulations,

as "in derogation of the carriers' common-carrier obligation to carry and their statutory obligation to provide adequate service." CAB Order 75-4-75, at p. 7; CAB Order 75-3-61, at pp. 3-4; CAB Order 75-2-127, at p. 3. We respectfully submit that the Court erred in upholding the CAB's casual and lawless creation of a new obligation to transport dangerous articles.

3. Even assuming arguendo that an abstract duty generally requires air carriers to transport hazardous freight packed, marked, etc. in conformance with DOT/FAA regulations, moreover, the Court should have accepted our contention that Section 1511(a) protects the reasonable actions taken here by airlines and airline pilots from CAB interference. The Court has interpreted this provision in a manner which prevents reliance upon it to justify a temporary refusal to accept a class of freight which, according to the government, is inherently dangerous and is prepared for shipment incorrectly more often than not. Its construction of this provision undermines and conflicts with the holding of Williams -- that a carrier's general duty to provide service is overridden by a refusal to provide service on safety grounds pursuant to government warnings -- for, as explained in Williams, supra, 509 F.2d at 948, ". . . Congress did not intend that the provisions of section 1374 would limit or render inoperative the provisions of section 1511. . ."

It was further recognized in Williams that honest doubt would justify a Section 1511 determination to refuse service for reasons of safety, since "Congress was certainly aware that . . . the carrier's formulation of opinion would have to rest on something less than absolute certainty." Id. Accordingly, as the Court also acknowledged, the

unverified reports of a governmental agency -- in Williams, the Federal Bureau of Investigation -- could form a satisfactory basis for a lawful refusal to provide service if they constituted ". . . evidence which would cause a reasonable careful and prudent air carrier of passengers to form the opinion that [providing service] 'would or might be inimical to safety of flight.' " Id.

Here, as in Williams, the relevant federal agencies warned that providing service might prove dangerous. In that case, the carrier formulated its opinion in large part on the basis of an FBI wanted poster, dated eight years earlier. Williams, supra, 509 F.2d at 945, n. 5. The instant refusals to transport hazardous materials, on the other hand, were based on an uncontested record containing a plethora of current studies and reports from the pertinent aviation officials, ALPA and others, showing, as the panel decision states (sl. op. 3759-60), ". . . rather convincingly that the regulatory scheme has been a dismal failure."

Thus, in every significant respect, the foundation for a Section 1511(a) refusal to provide service is at least as strong as in Williams. The refusals to provide service are broader in scope here than in Williams, it is true, but they are congruent with the government's warnings of danger, and therefore with the authority of airlines and their employees recognized in Section 1511(a) and in this Court's decision in Williams. See Hearings on H. R. 8370 Before the House Subcommittee on Transportation and Aeronautics of the Committee on Interstate and Foreign Commerce, 87th Cong., 1st Sess. (Aug. 7-8, 1961), at 63; Hearings on S. 2268 Before the Aviation Subcommittee of

the Senate Commerce Committee, 87th Cong., 1st Sess. (Aug. 4, 1961), at p. 48; Conf. Rep't No. 93-1194, 1974 U. S. Code Cong. and Adm. News 2814, 2828 (July 12, 1974). Government studies warn that any given package with a hazardous materials label on it is, more than three times out of four, in violation of the applicable safety regulations. Relying on these warnings, as was their right under Williams, the airlines and their employees made a good faith determination that any error should be on the side of safety, in accordance with long-standing aviation practices, common sense, and the duties imposed on them by law. The airlines and their personnel were under no burden to investigate the underlying accuracy of the government's findings and to choose, at their peril, which official pronouncements to believe and which particular pieces of freight to accept. Rather, they were entitled to accept the government's own admonitions and temporarily refuse to transport any cargo which in effect advertises that it "might be inimical to safety of flight."

To the extent that the Court's decision appears to imply a narrower view of the rights of airlines and airline pilots under 49 U.S.C. Section 1511(a), we respectfully submit that it is contrary to the Congressional purpose of this provision and the legislative history underlying its enactment, that it conflicts with the actual language chosen by the Congress to express itself and the Court's more well-reasoned construction of that language in Williams. And we therefore ask that the Court grant reconsideration or reconsideration en banc and thereafter reverse the CAB's rulings below. For, as we now

show, in conclusion, the inevitable result of the Board's proposed action, which has been stayed pending the completion of the instant proceedings, is a threat to aviation safety of unacceptable proportions.

4. Perhaps the Court's greatest error, with all due deference, lies in its calculation of the practical consequences of its decision. Noting the absence of DOT, FAA and the airlines from this litigation, the Court stated its belief that the issues posed herein were "primarily procedural" and "only peripherally related to the question of effective regulation of hazardous material in flight." (sl. op. 3764-65). The point of these remarks, presumably, is that the CAB's determination that its embargo regulation is inapplicable here is not, theoretically, a direct order to carry unsafe cargo. As a practical matter, however, the results will be the same. And no matter who joined this litigation as a party, therefore, its significance would not be enhanced for airline pilots, who are the ones actually contending with the smoke, flames and fumes too often generated by this type of cargo at 35,000 feet.

The government has recently developed its position that airlines must carry all allowable hazardous cargo, unless their restrictions follow the contours of a pending proposal in a DOT/FAA rule-making proceeding. See CAB Order 74-6-77, dated June 14, 1974, at pp. 2-4. On this theory, however, the CAB has "rejected" all hazardous

materials tariffs and embargoes which it deems unduly restrictive. 2/ The agency has thus purportedly deprived the airlines of all formal means of notifying the public, including hazardous materials shippers, of these restrictions which, as shown above, the airlines are entitled to impose. And despite the fact that the Board is thereby usurping the airlines' prerogatives, its message will not be lost on them. The financial stakes are high for the carriers, and an accident of catastrophic proportions, while probably just waiting to happen, has not happened yet. The carriers will therefore accept any arguably allowable freight tendered to them, as the government insists, and they will load it onto their airplanes. There, with 30 minutes or less to work with before departure and numerous other essential preflight tasks to perform at the same time, airline pilots will be expected to pour through the lengthy and complex hazardous materials regulations

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2/ Contrary to the Court's decision (sl. op. 3764-67), there is no merit in the CAB's contention, first offered only a week prior to the oral argument of this case before the Court, that the airlines' selection of the embargo device was technically inappropriate here. Railroad industry precedent clearly shows the propriety of the airlines' choice of the embargo; for, ". . . the right of the carrier to determine in the first instance the need of an embargo and the right to place that embargo for the proper conduct of its business are well settled." (Chicago & N.W. Ry. Co. v. Union Packing Co., 373 F.Supp. 734, 736-37 (D. Neb. 1974) (Teamsters Union strike sufficiently justified an embargo); accord, Asbury v. Chesepeake & Ohio Ry. Co., 314 F. Supp. 310, 311-12 (D.D.C. 1970) (embargo properly declared on branch line service utilizing tunnel which railroad investigators determined unsafe due to physical deterioration). The panel decision states that the CAB's position on this issue "deserved judicial deference" (sl. op. 3767), but the Court wisely chose not to rely on the Board's theory that its embargo regulation could not apply here because the air carriers were physically capable of transporting the embargoed materials, notwithstanding the ALPA-announced STOP program. However, rather than dismissing the embargoes as "hardly . . . temporary" (sl. op. 3766), the Court should have recognized that in aviation, as in the field of common carriage by water, "[T]he reasonableness of the embargo. . . should be determined or tested as of the time the embargo was declared." (Holt Motor Co. v. Nicholson Universal S.S. Co., 56 F. Supp. 585, 591 (D. Minn. 1944)). Had it done so, we submit that the Court could only reject the CAB's belated contention that the embargo device was technically unavailable to the carriers here, in accordance with the authorities discussed above.

in order to sort out the many illegal packages, the regular arrival of which the government's own studies have announced. It is thus inevitable that, lacking the practical opportunity and expertise for this task, pilots each day will be unable to discover thousands of unlawful packages threatening the safety of their flights. This is a situation neither flight crews, nor airline passengers can tolerate, and one we cannot believe the Court intended to condone.

Finally, although the Court observed that the STOP program does not preclude the shipment of unmarked dangerous freight and conjectured that the program may actually encourage shippers to evade the regulations by removing hazardous materials labels, ALPA submits that these points do not substantially detract from this essential program. The willful failure to mark or label a dangerous article is a criminal offense, punishable by a $25,000 fine and five years of imprisonment. (49 U.S.C. Sections 1472(h) and 1809(b)). Spot checks of all air freight shipments are being conducted for unidentified hazardous materials and ALPA will refer the violators found by its members to the appropriate prosecutorial authorities. For the present, however, while Operation STOP is not necessarily a total answer to the hazardous materials transportation crisis facing our nation, it is temporarily necessary. The CAB's decision in this case will unlawfully interfere with the rights of airlines and airline pilots if it is implemented and the Court should reconsider carefully before taking final action upon the petitions for review.

CONCLUSION

For the foregoing reasons, ALPA respectfully submits that the Court should grant rehearing or rehearing en banc and that, after such rehearing, the consolidated petitions for review should be granted.

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June 10, 1975.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition for Reconsideration and Suggestion for Rehearing en banc was mailed this day, first class postage prepaid, to Glen M. Bendixsen, Esquire, Civil Aeronautics Board, 1825 Connecticut Avenue, N. W. Washington, D. C. 20428.

Daniel M. Katz
DANIEL M. KATZ

June 10, 1975.